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No.

In The

Supreme Court of the United States

October Term, 1997

ROBERT K. FABRIC, M.D. and ROBERT K. FABRIC, M.D., P.A.,

Petitioners,

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit denied petitioners' ["Fabric"] procedural due process and equal protection of the law when, after reversing a summary final judgment entered in Fabric's favor, it then directed entry of summary final judgment in favor of respondent ["Provident"] even though (1) Provident had not moved in the trial court for summary judgment; (2) the record before the trial court had not been (fully) developed as numerous discovery requests which arguably bore on Provident's liability to Fabric remained outstanding; (3) no stipulation existed between the parties that the dispositive issues presented only questions of law; and (4) Fabric had no notice at all of, and hence no opportunity to cure, the alleged deficiencies.

2. Whether, under the Federal Rules of Civil Procedure, Rule 56, as construed in *Celotex Corporation v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) and its progeny, an appellate court can (or should) direct entry of a summary final judgment in favor of a party who had not moved below where [as here]: (1) no advance appellate court notice of the decision to so do existed thereby depriving the unwary recipient of the rule's notice; (2) no stipulation existed that the (arguably) dispositive issue is/was "one of law" and (3) discovery remained outstanding.

3. Whether the opinion herein sought to be reviewed violated well established principles of summary judgment law and thereby denied Fabric his right to trial on the merits when the appellate court both passed upon credibility questions and viewed the facts of the case in a light unfavorable to Fabric (the party sua sponte moved against).

PARTIES/INTRODUCTION

The petitioners, Robert K. Fabric, M.D. and Robert K. Fabric, M.D., P.A., were the plaintiffs in the trial court and were the appellees in the United States Court of Appeals for the Eleventh Circuit. The respondent, Provident Life & Accident Insurance Company, was the defendant/appellant. In this petition the parties will be referred to as they appear before this Court and, alternatively, as "Fabric" and as "Provident." The reference "App." will refer to the rule-required appendix accompanying this petition. All emphasis has been supplied by counsel unless indicated to the contrary.

Pursuant to Supreme Court Rules, Rule 1(b) and 29.6, the record reflects the existence of no parent, subsidiary, or affiliate entities as to either petitioner(s) or respondent.

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The opinion herein sought to be reviewed was rendered by the United States Court of Appeals, Eleventh Circuit (App. 1a-15a), now reported, *see Fabric v. Provident Life & Accident Insurance Company*, 115 F.3d 908 (11th Cir. 1997).

The decisions and orders of the United States District Court for the Southern District of Florida (which orders formed the basis for the subject appeal) are not reported (App. 16a-28a).

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254. The Eleventh Circuit entered its opinion on June 24, 1997, and same was rendered October 21, 1997, upon denial of Fabric's timely filed post-opinion motions for rehearing and rehearing en banc. Petitioners filed with this Court application for an extension of time in which to file petition for writ of certiorari. Same was granted by this Court on January 9, 1998, extending the time to file the subject petition to and including March 6, 1998.

Petitioners request that this Court exercise its discretion and review the merits of this controversy as the opinion of the United States Court of Appeals for the Eleventh Circuit has denied these petitioners procedural due process and equal protection of the law in that the Court has directed entry of a summary final judgment against these petitioners where respondent never moved for summary judgment in the trial court; where relevant and material discovery *due to petitioners from respondent* (*i.e.*, Provident's underwriting guidelines) remained outstanding; where the ten-day notice requirement of Federal Rule of Civil Procedure 56 was not complied with such that Fabric did not have fair opportunity to address the allegedly dispositive issue;

and where Florida substantive law overwhelmingly establishes that the operative and determinative issues (as found in cases of this nature) are "fact sensitive."

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure, Rule 56, is herein applicable. As pertinent the rule provides that a motion for summary judgment:

> . . . shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

STATEMENT OF THE CASE

A.

Fabric sued Provident to obtain disability benefits under a business overhead insurance policy. Provident answered and affirmatively raised as defenses to the complaint, accord and satisfaction, waiver, estoppel, fraudulent and/or negligent conduct by Fabric, setoff and the statute of limitations (R. 1-5-1).

Once the pleadings were framed Fabric moved for summary judgment (R. 2-37-1). *Provident moved for a continuance* contending that as a consequence of Fabric's litigation tactics, he had not allowed Provident to complete discovery. Provident

concluded therefrom that it would not be able to adequately respond to *Fabric's summary judgment motion* (R. 2-41-1).

Fabric likewise had sought discovery. Fabric filed his request for production, and first set of interrogatories requesting, inter alia, *Provident's underwriting guidelines* (R. 1-24-1; R. 2-23-1). Provident responded by *objecting* to almost all requested items including the production of Provident's underwriting guidelines, requiring Fabric to file a motion to compel (R. 2-36-1).

The parties' pre-trial stipulation reflects the following unresolved matters:

* * *

UNDISPOSED MOTIONS AND OTHER MATTERS REQUIRING ACTION BY COURT

22. FABRIC's Motion for Protective Order regarding subpoenas duces tecum issued to non-parties.

23. PROVIDENT's Motion to Compel Discovery.

24. PROVIDENT's Motion for Continuance.

25. FABRIC's Motion for Summary Judgment.

26. PROVIDENT's Motion for Entry of Confidentiality Order.

27. *FABRIC's Motion to Compel Discovery* [i.e., production of underwriting guidelines].

28. Stipulated Motion to Extend Time.

* * *

A pre-trial conference was held and argument on *Fabric's motion* for summary judgment was heard (R. 4-95-1). At that hearing the following colloquy occurred:

* * *

THE COURT: Okay. The Motion for a Continuance has previously been denied. The Motion to Remove the Case from the Jury Trial Docket is granted.

There are pending the Plaintiff's Motion for Protective Order, to Compel Discovery, the Defendant's Motion to Compel Discovery, and the Defendant's Motion for the Entry of a Confidentiality Order.

And I will send you the pretrial order and I will send you an order on the Motion for Summary Judgment; and depending upon the ruling, those rulings, I may or may not send you an order on the pending discovery motions.

MR. LANDAU: I'm not sure I understood that.

THE COURT: Well, *if I grant the summary judgment, then all of these other motions become moot.*

MR. LANDAU: Oh, yeah, that I understood.

> THE COURT: Okay. And if I deny it, then they may become viable. So it just depends. So I'll send you an order.

(R. 4-95-34)

* * *

The trial court ultimately entered an order granting Fabric's motion for summary judgment (App. 22a-28a). No order was entered on any of the pending discovery (motions or requests), the order granting summary judgment providing:

* * *

> Although there are facts that are disputed by the parties, or which have otherwise yet to be developed, they are not material given Florida law. Because the Court finds that each of Defendant's affirmative defenses are unavailing under Florida law, based on the facts that are not in dispute, summary judgment for Plaintiff is appropriate in this cause.

(App. 26a).

* * *

Provident objected to the entry of final judgment. By the happenstance of Provident's counsel's being retained to represent another insurance company in another matter, Provident's counsel reviewed documents from that other insurance company's files pertaining to Fabric. Review of those files uncovered a September 15, 1989 letter to that second insurance company from Fabric's counsel which Provident contended was an indication that the 1988 Provident policy, in

fact, had been rescinded by Provident. Provident filed a motion for reconsideration based upon newly discovered evidence (R. 3-64-1). The trial court ultimately entered an order denying Provident's motion for reconsideration concluding that counsel's legal conclusion was not evidence that the policy *had been* mutually rescinded (R. 3-81-1). Upon entry of summary judgment (all trial court matters having been concluded) Provident appealed (R. 3-83-1).

B.

On appeal the Eleventh Circuit, in a lengthy opinion, reversed the summary final judgment entered in favor of Fabric and directed entry of summary final judgment *for* Provident. Although the record was "conclusive" in only one regard, that *neither* Fabric *nor* the trial court had before it Provident's underwriting guidelines [Fabric's discovery motions had not been ruled on much less granted (App. 26a)], the appellate court stated:

* * *

> After full investigation and review *Provident concluded that, counting the undisclosed coverage, Fabric, was grossly overinsured. It notified Fabric's attorney that it would not have issued the 1988 policy had it known of the non-disclosed policies* because the total insurance already in force at the time of the December application exceeded the limits of the coverage it would write. On November 29, 1989 Provident wrote Zuckerman (Fabric's counsel):
>
> > Our Underwriting Department has reviewed the information concerning Dr. Fabric's disability coverage with us and

> other carriers. The amount of disability insurance in force exceeds the limits of coverage we would have been willing to issue.
>
> The 12/14/87 application for overhead coverage did not contain the complete outline of disability insurance coverage in force at the time. Had our Underwriting Department been aware of the extent of disability coverage in force the 12/14/87 application would not have been approved and no additional overhead expense coverage would have been issued. Again the reason being that Dr. Fabric's coverage already in force at the time of the 12/14/87 application exceeded our Underwriting approval limits. This rule applies to both overhead and disability income coverage as well.
>
> Our only choice was to reissue Policy #06 BE 571223 [the 1983 policy] which we have enclosed. . . . Should you have any questions concerning this please do not hesitate to contact us. (Bracketed material added).

115 F.3d at page 911.

* * *

Concluding from the record before it that Fabric was *not* entitled to a summary final judgment, the Court turned to what relief *it believed* Provident was entitled to even though Provident

had not moved in the trial court for summary judgment and had not requested summary judgment relief in the appellate court. *See* Provident's brief on appeal:

* * *

> For the foregoing reasons, appellant, Provident Life & Accident Insurance Company, respectfully requests the Court reverse the District Court's grant of summary judgment in favor of Fabric and against Provident. Additionally and/or alternatively, Provident respectfully requests reversal of the summary judgment on the grounds that it was not permitted sufficient discovery to enable it to adequately respond to the summary judgment motion. Lastly, Provident seeks reversal of the award of attorney's fees and costs in favor of Fabric.

(Appellant's initial brief, page 35.) The appellate court stated:

* * *

> In this Court Provident has not asserted a right to summary judgment. But, as we have noted, the District Court addressed and rejected unilateral rescission and accord and satisfaction and the parties on appeal have fully briefed the issues. This is a slam dunk case whether based on unilateral rescission or rescission by agreement (accord and satisfaction). *The power of an appellate court to order summary judgment for a party who did not move for it in the District Court has been widely recognized by circuit courts and other authorities, including our predecessor, the Fifth Circuit, in a decision binding on us. Black Warrior Elec. Membership Corp. v.*

Miss. Power Co., 413 F. 2d 1221, 1226 (5th Cir. 1969) (citations omitted).

Summary judgment in favor of a non-moving party has become an accepted method for an appellate court to expedite litigation. Morgan Guar. Trust Co., 466 F. 2d at 600. There the Court found that its grant of summary judgment to a non-movant was "just under the circumstances" in light of a *fully developed factual record* and was consistent with 28 U.S.C. Section 2106 (citation omitted).

* * *

Professor Moore explains that an appellate court may properly grant summary judgment for the non-moving party as long as all facts bearing on the issue in question are before the court and establish that the non-movant is entitled to judgment as a matter of law (citations omitted).

If a party did not have an opportunity to present *his side of a dispute*, granting summary judgment for a non-moving party would be improper (citations omitted). . . . Facts relevant to the issues of rescission and accord and satisfaction were fully developed in the District Court. Fabric had a fair opportunity to dispute and did present facts pertinent to the issue. The District Court addressed and relied on both rescission and accord and satisfaction. Directing summary judgment for Provident on appeal does not result in procedural prejudice to Fabric . . .

* * *

Fabric's motion for rehearing and rehéaring en banc was denied (App. 16a).

This proceeding follows.

REASONS FOR GRANTING THE WRIT

The petitioners would respectfully request that this Court exercise its discretion and review the merits of this controversy as the opinion of the Eleventh Circuit has so far departed from the essential requirements of the law so as to make intervention by this Court necessary. The Eleventh Circuit has denied these petitioners procedural due process and equal protection of the law in that the Court has directed entry of a summary final judgment against these petitioners where respondent never moved for summary judgment in the trial court; where discovery *due petitioners from respondent* remained outstanding; where the notice requirement of Federal Rule of Civil Procedure 56 was not complied with; where general principles of summary judgment law were violated, to wit: the Court *did not* accord to the (very surprised) petitioners favorable inferences from even the undisputed testimony; and, where Florida substantive law overwhelmingly establishes that the operative and determinative issues (as found in cases of this nature) are "fact sensitive."

A.

At the outset, Fabric would acknowledge that *generally* courts are possessed of the power to sua sponte order the entry of summary judgment. This Court has made this clear in *Celotex Corporation v. Catrett, supra*, 477 U.S. at page 326:

> . . . *District courts* are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice

> that she had to come forward with all of her evidence
> . . .

It is, of course, important to understand that in *Celotex Corp. v. Catrett, supra*, this Court was directing its comments to the power of the "district courts" to enter summary judgments sua sponte. While it is clear that the District Courts are possessed of the power to enter summary judgments sua sponte, what is *equally clear* is that *all courts discourage the practice* of granting summary judgment sua sponte given its effect of denying a litigant his right to have a trial on the merits and to have the trier of fact decide the factual disputes extant between the parties. *See Ramsey v. Coughlin*, 94 F.3d 71 (2d Cir. 1996). In *Glaverbel Societe Anonyme v. Northlake Marketing & Supply*, 45 F.3d 1550 (Fed. Cir. 1995), it was noted that *courts cannot grant summary judgment* where the non-moving party was given *either* an inadequate opportunity, or no opportunity, to respond.

In *Goldstein v. Fidelity & Guaranty Insurance Underwriters*, 86 F.3d 749 (2d Cir. 1996), the Court squarely held:

> The party against whom summary judgment is entered must have *notice* that the court *is considering* dropping the ax on him before it actually falls (citations omitted) . . . In other words, the entry of summary judgment is inappropriate when it takes a party by surprise.

86 F.3d at page 751. In accord *Berkowitz v. Home Box Office, Inc.*, 89 F.3d 24 (1st Cir. 1996), wherein the court noted that while the District Courts have the power to grant summary judgment *sua sponte*, the court contemplating the taking of such action must insure:

> . . . that the targeted party has an adequate opportunity to dodge the bullet.

89 F.3d at page 29. In *Berkowitz*, the court further stated:

> We have placed two conditions on unbesought summary judgments. First, a District Court ordinarily may order summary judgment on its own initiative *only when discovery* is sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts (citations omitted). Second, the court may enter summary judgment *sua sponte* only if it *first* gives the targeted party appropriate notice and a chance to present its evidence on the essential elements of the claim or defense. See: Celotex, 477 U.S. at page 326, 106 S. Ct. at 2554 . . .

89 F.3d at page 29. *See also Ramsey v. Coughlin*, 94 F.3d 71 (2d Cir. 1996):

> Whenever the court believes that the non-moving party is entitled to judgment, great care must be exercised to assure that the original movant has had an adequate opportunity to *show* that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law . . .

94 F.3d at page 74.

In the overall discussion of whether or not sua sponte summary judgment is "appropriate," sight should not be lost of the obvious, to wit: sua sponte or not, the motion is one for *summary* judgment! To that end it cannot be overemphasized that in passing upon a motion for summary judgment (sua sponte

or otherwise) a court cannot weigh disputed evidence, decide questions of credibility or draw inferences concerning the knowledge and intent of the parties. Matters involving credibility, the weighing of evidence, and the drawing of inferences (even from the undisputed facts) are functions within the province of the trier of fact. *See Hanover Insurance Company v. American Engineering Co.*, 33 F.3d 727 (6th Cir. 1994) and *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989). Fabric makes these observations given the Eleventh Circuit's treatment of the subject facts and the conclusion reached:

> . . . Facts relevant to the issues of rescission and accord and satisfaction were fully developed in the District Court. *Fabric had a fair opportunity to dispute and did present facts pertinent to the issue.* The District Court addressed and relied on both rescission and accord and satisfaction. Directing summary judgment for Provident on appeal does not result in procedural prejudice to Fabric.

115 F.3d at page 915. With all due respect to the Eleventh Circuit, it is one thing to suggest that "all facts" are before the Court (which is questionable in this case in the first place given the existence of outstanding discovery on both sides) and another to suggest that the (limited) facts (before the Court) lead to only one inference or conclusion especially where, as here, knowledge, intent and credibility are involved. By unilaterally awarding summary judgment to Provident under an analysis which differed from the trial court's analysis, the Eleventh Circuit undermined the careful procedural balance put in place by the summary judgment rule. In *Celotex Corp. v. Catrett*, *supra*, this Court emphasized, *see* 477 U.S. at page 327:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and

> defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual basis.

In directing the entry of summary judgment in favor of Provident the Eleventh Circuit relied upon the opinion of the Fifth Circuit in *Black Warrior Elec. Membership Corp. v. Mississippi Power Co.*, 413 F.2d 1221 (5th Cir. 1969) to support the following assertion:

> The power of an appellate court to order summary judgment for a party who did not move for it in the District Court has been *widely recognized* by Circuit Courts and other authorities, including our predecessor, the Fifth Circuit, in a decision binding on us . . .

115 F.3d at page 914. Fabric would suggest that the Court's decision in *Black Warrior* to enter judgment, and the statement in *Black Warrior* regarding the authority for the entry of judgment, were uttered in the context of the construction of a contract regarding indemnification *in addition to the fact* that the parties treated the issue as "one of law." Stated another way, it was undisputed that there existed no facts bearing on the issue *and* the matter remained a matter of law for the court, to wit: interpretation of a contract! *Such is not the case here*!

Fabric would further suggest to this Court that the Eleventh Circuit's observation that it has been "widely recognized" by Circuit Courts that an appellate court has the *power* to order summary judgment for a party who did not move for it in the District Court begs the dispositive issue herein.

While it may be true that an appellate court has the "power" to direct entry of a summary judgment in favor of a party who has never moved for same, the circumstances in which such "power" has been exercised perforce excludes situations, as here, where the appellate court chooses to sit as a "factfinder." In this case the Eleventh Circuit has *accepted* Provident's assertions that it would not have issued an additional policy had it known of the existence of those (policies) allegedly not disclosed. Yet we know from the record before this Court that the underwriting guidelines were never produced to Fabric! Given that the record is silent as to what the underwriting guidelines provide, one should not *assume* their content and, hence, their effect on the facts and circumstances of this case. This is precisely why notice under Federal Rule of Civil Procedure 56(3) is so important. The "notice" required under the rule is not an unimportant technicality "but a vital procedural safeguard." *See Hanson v. Polk County Land, Inc.*, 608 F.2d 129 (5th Cir. 1979). As stated by the court in *Stella v. Town of Tewksbury*, 4 F.3d 53 (1st Cir. 1993), notice under Rule 56 insures that litigants will have (at least) ten days in which to formulate and prepare their best opposition to an impending assault upon the continued viability of their claim or defense.

The trial court's ruling in this case *did not* embrace the issues which implicated the underwriting guidelines. As a consequence Fabric had no reason to address (in the trial court) the issue. At the pretrial conference, even counsel for Provident admitted that the trial court's ruling (on Fabric's motion for summary judgment) would "moot" all issues involving the underwriting guidelines themselves. The Eleventh Circuit's opinion accepting as "fact" what Provident would have done absent exploration of what their underwriting guidelines would have allowed violates Rule 56. More to the point, perhaps, is the fact that *just these observations alone* remove this case from the parameters of *Black Warrior*, *supra*, upon which the

Eleventh Circuit relied. In *Black Warrior* all agreed the issue before the Court was "one of law." In this case (almost) all agree that if the trial court had *denied* Fabric's motion for summary judgment, the issues to be determined remained "matters of fact."

The opinion rendered by the Court in this case is in conflict with most, if not all, of the cases cited, *supra*. Certiorari is needed to resolve this conflict.

B.

Fabric does not advance his arguments in a vacuum. In giving summary judgment to Provident, the Court considered all facts *against* Fabric and elevated non-record information to the status of undisputed facts, all without giving Fabric the benefit of the existing record facts and their attendant inferences. It is too well settled to need *any* citation of authority that such approach is plainly incompatible with Rule 56.

In entering summary judgment in favor of Provident the Court concluded that the issues of unilateral rescission and accord and satisfaction had been "fully briefed." *See Fabric*, *supra*, 115 F.3d at page 194. Concluding that this was a "slam dunk case whether based on unilateral rescission or rescission by agreement (accord and satisfaction)," the court discussed the facts of the case and premised its decision upon its belief that:

> Under the undisputed evidence, Provident would not have assumed responsibility for an additional $10,000 per month had it known of the undisclosed policies.

See 115 F.3d at page 912. In point of fact the very matter in dispute involved "whether Provident would have issued the policy." It should be reminded here that Fabric's discovery

requests not only included a demand that Provident produce its underwriting guidelines but that Provident *refused to provide same* (R. 2-45-1). Because the underwriting guidelines are not within the subject record it was not for the Court to conclude *one way or the other*, their content! Further, the suggestion that Fabric "did not contest the rescission" was not part of Fabric's motion for summary judgment which focused only on *the effect of* Provident's failure to sue *for* rescission of the 1988 policy.

Additionally, Fabric was not strictly bound by the representations in the Provident application, because the disclosures were made only "to the best of (Fabric's) knowledge and belief." An insurance company application containing a "knowledge and belief" signature clause does not activate the unilateral rescission provision of Section 627.409, Fla. Stat. (1996). Where an insurance company application contains a "knowledge and belief" signature clause, same is subject to a factual determination of what the applicant in fact believed to be true. *See Carter v. United of Omaha Life Insurance*, 685 So. 2d 2 (Fla. App. 1st 1996), *approved*, *Green v. Life & Health of America*, 23 Fla. L. Weekly S42 (Florida Supreme Court Case No. 90,747, opinion filed January 22, 1998). Hence, when a "knowledge and belief" application is used by an insurance company, a genuine fact issue arises as to the effect of a misrepresentation or omission on the issued policy. The language used in the Provident application precludes summary judgment in favor of Provident because a fact issue exists as to whether the purported errors were innocent or unknowing. *See Green v. Life & Health of America*, 23 Fla. L. Weekly S42 (Florida Supreme Court Case No. 90,747, opinion filed January 22, 1998):

> In summary, we hold that an insured's truthful answers on an insurance application according to the best of the insured's "knowledge and belief," do

> not constitute misstatements within the meaning of Section 627.409, Florida Statutes (1993), and therefore cannot provide the grounds for the insurer's rescission of the insurance policy . . .

23 Fla. L. Weekly at S44.

It is respectfully suggested to this Court that because the issue of Fabric's knowledge of the misstatement was not conclusively resolved *and had never been an issue presented to the trial court*, the appellate court's decision to enter judgment in Provident's favor is totally out of harmony with established principles of Florida *substantive* law and reaches the legal conclusion that it does utilizing a procedure which is foreign to well established principles of federal *procedural* law. Where the opinion of the Eleventh Circuit is substantively inaccurate is in its assertion:

> . . . a material misstatement provides a basis for rescission even if the applicant could not have known of its inadequacy.

See 115 F.3d at page 913. Fabric would suggest to this Court that the rule *as stated* only applies (in Florida) in the case of an absolute certification application. In this case Fabric was entitled to an opportunity to have the factfinder pass on his knowledge regarding an unintentional or unknowing omission on the policy application. This is so because, according to *Green, supra*, once Provident diluted its own contract language, it could no longer seek refuge behind a more strict standard. Further, even this assumes that the raised defenses were still available to Provident *post* the Florida Supreme Court's opinion in *Green, supra*. Sight should not be lost of the fact that at the pretrial hearing (where Fabric's motion for summary judgment was argued) counsel for Provident admitted that any action by Provident for

rescission would have been barred given the two-year "incontestability period." (R. 4-95-27, 28, 29) Because this factual issue could not have been resolved against Fabric without trial on the merits (and) especially without discovery as to the relevant evidence, Provident could not have prevailed on a summary judgment.

Lastly, Provident could not have prevailed on a summary judgment regarding "accord and satisfaction." The record before the appellate court was not conclusive as to what Fabric *thought* he was accepting. Both the accompanying letter and the final check from Provident referenced only the 1983 policy and made no reference to the 1988 policy which was the subject matter of this case (R. 2-51-16). Neither the final check on the 1983 policy nor its accompanying letter stated or hinted that the acceptance of the payment was in full satisfaction of the 1988 policy (R. 2-51-16). Under Florida law, Fabric was allowed to cash the checks he received as partial payment against the 1988 policy and sue for the difference (R. 2-37-17). In point of fact Provident never disputed that it owed this money to Fabric.

C.

The Eleventh Circuit's decision *to reverse* the summary final judgment in favor of Fabric, at this stage of the proceedings, may, arguably, be correct. However, the Eleventh Circuit's decision to enter judgment *in favor of Provident* so far departs from the essential requirements of the law as to require this Court's intervention:

1. Provident had not moved in the trial court for summary judgment.

2. No stipulation existed that the dispositive issue is/was "one of law."

3. Discovery remained outstanding at the time of the trial court's ruling.

4. No advance appellate court notice of the decision to enter summary judgment was given thereby depriving Fabric of the notice required under Rule 56.

5. Genuine issues of material fact abound concerning Fabric's knowledge and intent. Matters of credibility cannot be adjudicated, determined or decided on motion for summary judgment.

This Court should exercise its discretion and review the merits of this case.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioners respectfully urge this Honorable Court to exercise its discretion and to review the merits of the subject controversy. The petitioners would further request that this Court, after merits review, grant the subject petition and quash the opinion of the United States Court of Appeals for the Eleventh Circuit with directions to that court to remand the cause to the trial court to allow Fabric full opportunity to pursue his discovery requests.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 24, 1997

Robert K. FABRIC, M.D., Robert K. Fabric, M.D., P.A., a Florida Professional Association, Plaintiffs-Appellees,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, a Tennessee Corporation authorized to do business in the State of Florida, Defendant-Appellant.

Nos. 95–4388, 95–4975.

United States Court of Appeals,
Eleventh Circuit

June 24, 1997.

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

This is a removed diversity case brought by Dr. Robert K. Fabric and his professional association against Provident Life and Accident Insurance Company, which had issued disability insurance policies providing for payment of business expense if Dr. Fabric became disabled. Fabric did become disabled, and

Appendix A

Provident made monthly payments amounting to $10,000 per month for twenty-four months. Two years after payments ceased Fabric filed this suit, claiming that he had been entitled to $20,000 per month. Provident asserted affirmative defenses including accord and satisfaction, rescission, waiver and estoppel. The district court granted summary judgment for Fabric, denying all of Provident's defenses. We REVERSE and DIRECT that summary judgement be entered for Provident.

In July 1983 Provident issued to Dr. Fabric an overhead expense disability insurance policy providing that if he became disabled it would pay covered expenses incurred in the operation of his business or profession up to $10,000 per month for twenty-four months. In December 1987 Fabric applied to Provident for additional business expense coverage of $10,000 per month in the event he became disabled. In March 1988 Provident issued a new policy that provided for payment of up to $20,000 per month for twenty-four months. The new policy stated "this policy is issued in lieu of and replaces policy number 6-BE-571223, dated July 25, 1983."

The December 1987 application required Fabric to state whether he had or was applying for other disability income coverage or overhead expense disability coverage. He responded by giving information on two individual disability policies that had been issued by Provident (that is, with benefits payable to Fabric but unrelated to his business expense), and the 1983 policy issued by Provident. He did not reveal disability policies issued by two other companies, Monarch Life and MGIS, that provided for benefits of approximately $11,500 per month.

In February 1989 Fabric became disabled. His disabled status is not disputed. In March 1989 he submitted to Provident

through his attorney, Leslie Zuckerman, a single notice of claim asserting benefits under Provident's two individual policies and the March 1988 overhead expense policy.[1] In an accompanying letter Zuckerman stated that Fabric desired that future correspondence regarding the claim be through Zuckerman's office.

In June 1989 Provident made an initial payment under the 1983 policy of some $28,000.[2] However, in reviewing Fabric's status Provident discovered other disability insurance coverage that had not been revealed in the December 1989 application. It commenced an investigation to determine whether pursuant to its underwriting guidelines it would have issued the 1988 policy had it known of the undisclosed insurance. In July 1989 Provident notified Fabric's attorney that until the matter was resolved it would pay Fabric the $10,000 per month benefit that Fabric would be entitled to under the 1983 policy if it had not been replaced by the 1988 policy, and it continued to make such monthly payments.

After full investigation and review Provident concluded that, counting the undisclosed coverage, Fabric was grossly overinsured. It notified Fabric's attorney that it would not have issued the 1988 policy had it known of the non-disclosed policies because the total insurance already in force at the time of the December application exceeded the limits of the coverage it

---

1. There is no dispute concerning the two individual disability policies. Claims under them have been regularly paid.

2. $10,000 per month was the maximum for covered business expense. Expenses varied from month to month, but it is undisputed that, over the span of payments, Provident paid the maximum benefits under the 1983 policy.

would write. On November 29, 1989 Provident wrote Zuckerman:

> Our Underwriting Department has reviewed the information concerning Dr. Fabric's disability coverage with us and other carriers. The amount of disability insurance in force exceeds the limits of coverage we would have been willing to issue.
>
> The 12/14/87 application for overhead coverage did not contain the complete outline of disability insurance coverage in force at the time. Had our Underwriting Department been aware of the extent of disability coverage in force the 12/14/87 application would not have been approved and no additional overhead expense coverage would have been issued. Again the reason being that Dr. Fabric's coverage already in force at the time of the 12/14/87 application exceeded our Underwriting approval limits. This rule applies to both overhead and disability income coverage as well.
>
> Our only choice was to reissue Policy # 06 BE 571223 [the 1983 policy] which we have enclosed. . . . Should you have any questions concerning this please do not hesitate to contact us. (bracketed material added).

In January 1990 Provident sent to Fabric a check for $939 with a reference that it was unearned premium on the 1983 policy. Fabric's office inquired about the check, and Provident wrote that it represented the difference between the premiums for the 1988 policy and the 1983 policy. Fabric did not respond

and never cashed the check. He made no response to Provident's reissuance of the 1983 policy. However, after the November notification letter was received, he filed a claim form each month that detailed his expenses and listed the policy numbers of the two individual policies and of the 1988 policy.

For sixteen months following Provident's November 29 notification letter to Fabric, Provident continued to make monthly payments that totaled $160,000, that is, until $240,000, the extent of the benefits under the 1983 policy, had been paid. Each of these checks was cashed by Fabric without comment or protest. The last check, issued March 14, 1991, recited that it was "FULL settlement of claim originating on or about February 3, 1989" (the date on which Fabric claimed to have become disabled). It also said: "This is a full and final payment as you have received the maximum allowance under this contract," and it listed the policy number of the 1983 policy. The check was accompanied by a letter stating that a "final check" on the 1983 policy was enclosed. This check too was cashed without comment. Two years passed without further demand or inquiry by Fabric, then Fabric filed this suit seeking additional benefits of $10,000 per month for twenty-four months.

Provident's counsel was also retained by Monarch Life, one of the companies with which Fabric had an undisclosed disability policy. Monarch had challenged the validity of its policy because in his application to it (made before Provident's November 1989 letter) Fabric had not disclosed the 1988 Provident policy. According to Provident/Monarch counsel, in pursuing the dispute between Fabric and Monarch he became aware, after the summary judgment decision was entered in this case, of a letter previously unknown to Provident, that had been

written to Monarch by Zuckerman. On September 15, 1989 Zuckerman had written Monarch:

> As I indicated to you in our meeting, *Provident Life & Accident has rescinded their policy effective February 1, 1988. Since the rescission relates back to the effective date, Dr. Fabric was never covered under Provident's disability policy other than the original policy in the amount of $10,000.00.* . . . Provident's $10,000.00 of additional overhead reimbursement was effectively never issued by Provident. . . .

(Emphasis added). Provident moved the court to reconsider the summary judgment decision against it because of the acknowledgments in the letter. The court denied the motion on the ground the letter was irrelevant. This was error. Fabric and Zuckerman agree that Zuckerman was authorized to act for Fabric in dealings with Provident. The statements by Zuckerman in the letter were admissions against Fabric's interest, highly relevant to Provident's defense, whether specifically authorized by Fabric or within the attorney's actual or apparent authority.

Fabric argues to this court that Zuckerman's letter could not constitute an admission that Provident had rescinded any obligation to pay the second $10,000 per month because it was written September 15, 1989 and Provident's letter of notification was not written until November 30. But before he wrote his letter of September 15 Zuckerman had been negotiating with Provident and had sought information concerning Provident's right to rescind based on its underwriting policies. It is astonishing to us that Fabric should contend that representations to Monarch by his authorized attorney, made in pursuit of

Fabric's interests with Monarch but describing Fabric's relations with Provident (conducted through that same attorney), were not binding upon him because the attorney could not have known whether what he represented as truth was actually true.

We turn to the Florida law. By statute existent at the time of relevant events of this case Florida provided that misrepresentations or incorrect statements would not prevent a recovery under an insurance policy unless either:

> "(a) Fraudulent; or
>
> "(b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> "(c) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

See Historical note to Fla. Stat. Ann. § 627.409 (1996), which set out the pre–1992 language of this section.

A host of cases recognize that the insurer is not liable on a policy where the requirements of the Florida statute exist. *E.g., First Nat'l Bank Holding Co. v. Fidelity & Deposit Co. of Maryland,* 885 F. Supp. 1533 (N.D. Fla. 1995). See also, Ann. to § 627.409. In this case, as in *National Union Fire Ins. Co. v.*

Sahlen, 999 F.2d 1532 (11th Cir. 1993), it is obvious that the misrepresentations in Fabric's application affected the risks assumed by Provident and, under the undisputed evidence, Provident would not have assumed responsibility for an additional $10,000 per month had it known of the undisclosed policies.

Where a misrepresentation occurs that meets the requirements of § 627.409 the insurer, as a matter of right, may unilaterally rescind. *Pino v. Union Bankers Ins. Co.*, 627 So. 2d 535 (Fla. Dist. Ct. App. 1993). *Pino* points out that this is consistent with *Restatement (Second) of Contracts* § 7 and illus. 2 (1981).[3]

The misrepresentation need not be fraudulently or knowingly made but need only affect the insurer's risk or be a fact which, if known, would have caused the insurer not to issue the policy nor to issue it in so large an amount. *First Nat'l*

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3. § 7. Voidable Contracts

A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.

Illustrations:

2. A, by fraud, induces B to make a promise to pay A money in consideration of goods delivered by A to B. There is a contract, but the fraudulent representations of A give B a power to avoid by tendering back to A within a reasonable time the goods received from him.

Bank Holding Co., supra; *Old Southern Life Ins. Co. v. Kirby*, 522 So. 2d 424 (Fla. Dist. Ct. App. 1988).

Where the party who has been misled has the right to rescind no consent by the opposing party is needed. *Pino*, supra. A material misstatement provides a basis for rescission even if the applicant could not have known of its inadequacy. *William Penn Life Insurance Co. of New York v. Sands*, 912 F.2d 1359 (11th Cir. 1990), *Preferred Risk Life Ins. Co. v. Sande*, 421 So. 2d 566 (Fla. Dist. Ct. App. 1982). Fabric asserts that he told the insurance agent of all of his insurance but the agent failed to list the undisclosed policies on the Provident application. If accepted as true, this does not vitiate Provident's rights. *First Nat'l Bank Holding Co.*, supra.

Apart from the right to unilaterally rescind, both parties may bilaterally agree to rescission (at times referred to in Florida cases as a type of accord and satisfaction). Also, where misrepresentation occurs that meets the requirements of § 627.409 the insurer may assert this as a defense to enforcement of the policy.

The district court observed that Provident had not urged unilateral rescission. Nevertheless, it went on to address unilateral rescission and held that Provident's November 29 letter and its subsequent actions, including refund of the difference in premiums, did not constitute a clear manifestation by Provident of an election to unilaterally rescind but rather constituted an effort to restore the status of matters as they would have been absent the December 1987 application with its misrepresentations. The court erred. It correctly described the events but misunderstood the consequences. Provident did not seek to rescind its initial obligation to pay $10,000 per month,

and it has faithfully performed that obligation. What Provident rescinded was agreement on its part to extend an additional coverage of $10,000 per month; that is what the misrepresentation related to. Provident's actions thereafter were consistent with its unilateral rescission of any obligation to pay a second $10,000 per month. It sent a refund of the additional premium. Each check previously issued had referred to the 1988 policy. Each subsequent check referred to the 1983 policy. The final payment and accompanying letter referred to payment in full of the 1983 contract benefits and full payment of Fabric's disability claim.

The theory that runs through Fabric's case is that Provident could not rescind the obligation for the second $10,000 per month unless Fabric agreed (and it asserts that he never agreed) or Provident filed suit and obtained a judicial determination that Provident had rescinded. As evidence of his non-acquiescence Fabric relies on the fact that after Provident had notified him that it would not be responsible for the second $10,000 per month he sent in a single claim form each month, reciting the policy numbers of the two individual policies and of the 1988 policy. But Fabric's consent to unilateral rescission was not required. His post-rescission indication of non-acquiescence does not vitiate the rescission. As a matter of law Provident unilaterally rescinded.

While not necessary to consummate a unilateral rescission, as already pointed out Provident's actions thereafter were consistent with the fact that it had rescinded its undertaking to pay an additional $10,000 per month. On Fabric's part, other than listing the 1988 policy number on each monthly claim, his conduct was consistent with non-existence of a second $10,000 of coverage. He never responded to the notification

letter. He did not cash the premium refund check, but he never returned it. His attorney represented to Monarch that Provident had rescinded. Fabric accepted and cashed each monthly check including the final check tendered as payment in full, and for two years thereafter stood mute. Even then he asserted no demand but just sued.

The sole case relied on by the district court was *Pino*. That case does not control. Pino obtained a health insurance policy from the insurer, and, a year and a half later, applied for reimbursement of medical bills. In response the insurer sent a four-sentence letter stating that it had learned that the medical facts on Pino's application were not complete and had it known the complete history it wouldn't have issued the policy. And it sent a check refunding premiums. Pino sued. The trial court entered summary judgment for the insurer.

The DCA reversed. It recognized that where the insured has made a fraudulent misrepresentation the defrauded party has the unilateral right to rescind without consent by the opposing party. It construed the insurer's action—directed to "a hapless insured," "an uninformed and unsophisticated insured" without counsel—as a mere effort to repudiate and insufficient to establish rescission by accord and satisfaction. The court intermingled discussion of repudiation, unilateral rescission and bilateral rescission (accord and satisfaction). The insurer's letter came nowhere close to meeting the requirements of § 627.409 that might justify unilateral rescission. The alleged misrepresentation, omission or concealment of facts was not identified other than a one-sentence assertion that the medical history was incomplete. What information was allegedly omitted, and its import, were unrevealed. Other than the insurer's one-sentence statement, nothing tended to support the

requirement that the insurer would not have issued the policy had it known the true facts. There was only one claim and one check, compared with the present case where the claims were ongoing and rescission occurred after the insurer gave notice of its grounds and engaged in negotiations orchestrated by Fabric's attorney that fully revealed its basis for rescission.

Understandably, in *Pino* the DCA held that summary judgment for the insurer was inappropriate. It remanded for a trial at which "the insurance company will be able to demonstrate that it has good grounds for a judicial rescission of this insurance policy."

Under the facts of this case, even if there had been no unilateral rescission when Provident notified Fabric it was rescinding, as a matter of law there was a subsequent rescission by accord and satisfaction. Where a party cashes a check but protests that additional payment is necessary to fully satisfy the alleged debt, accord and satisfaction operates to bar that party's claim for further payment. *Burke Co. v. Hilton Devel. Co.*, 802 F. Supp. 434 (N.D. Fla. 1992); *Miller-Dunn Co., Inc. v. Green*, 154 Fla. 72, 16 So. 2d 637 (1944) (where a party cashes a check but protests that additional payment is necessary to fully satisfy the alleged debt, accord and satisfaction operates to bar that party's claim for further payment). Fabric's monthly notation of the 1988 policy number is a slender reed but, assuming it served to keep the dispute alive, the bell rang when, after sixteen months (if not sooner) Provident tendered the last check as payment in full of the 1983 policy and of Fabric's claim, and Fabric accepted and cashed the check and stood mute thereafter.

In this court Provident has not asserted a right to summary judgment. But, as we have noted, the district court addressed

and rejected unilateral rescission and accord and satisfaction and the parties on appeal have fully briefed the issues. This is a slam dunk case whether based on unilateral rescission or rescission by agreement (accord and satisfaction). The power of an appellate court to order summary judgment for a party who did not move for it in the district court has been widely recognized by circuit courts and other authorities, including our predecessor, the Fifth Circuit, in a decision binding on us. *Black Warrior Elec. Membership Corp. v. Miss. Power Co.*, 413 F.2d 1221, 1226 (5th Cir. 1969); *see, e.g., Dickeson v. Quarberg*, 844 F.2d 1435, 1444, n. 8 (10th Cir. 1988); *Martinez v. U.S.*, 669 F.2d 568, 570 (9th Cir. 1981); *Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 366 (6th Cir. 1993), *In re Continental Airlines*, 981 F.2d 1450, 1458-59 (5th Cir. 1993); *Uzzell v. Friday*, 547 F.2d 801, 805 (4th Cir. 1977), *vacated on other grounds*, 438 U.S. 912, 98 S. Ct. 3139, 57 L. Ed. 2d 1158 (1978); *Viger v. Commercial Ins. Co.*, 707 F.2d 769, 774 (3rd Cir. 1983); *Procter & Gamble Indep. Union v. Procter & Gamble*, 312 F.2d 181 (2nd Cir. 1962), *cert. denied*, 374 U.S. 830, 83 S. Ct. 1872, L. Ed. 2d 1053 (1963); *First Nat'l Bank v. Maryland Cas. Co.*, 290 F.2d 246, 251 (2nd Cir. 1961); *Mullen v. St. Paul Fire & Marine Ins. Co.*, 972 F.2d 446 (1st Cir. 1992).

Summary judgment in favor of a non-moving party has become an accepted method for an appellate court to expedite litigation. *Morgan Guar. Trust Co.*, 466 F.2d at 600. There the court found that its grant of summary judgment to a non-movant was "just under the circumstances" in light of a fully developed factual record and was consistent with 28 U.S.C. § 2106. That section provides:

Appendix A

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Professor Moore explains that an appellate court may properly grant summary judgment for the non-moving party as long as all facts bearing on the issue in question are before the court and establish that the non-movant is entitled to judgment as a matter of law. 6 James Wm. Moore et al., Moore's Federal Practice ¶ 56.12; *see also* 10 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice & Procedure § 2716 (2d ed. 1983).

If a party did not have an opportunity to present his side of a dispute, granting summary judgment for a non-moving party would be improper. *E.g., Fountain v. Filson,* 336 U.S. 681, 69 S. Ct. 754, 93 L. Ed. 971 (1949) (the circuit court improperly ordered summary judgment on a new issue for the non-moving plaintiff where his opponent was deprived of an opportunity to dispute facts relevant to the issue). However, *Fountain* does not apply here. Facts relevant to the issues of rescission and accord and satisfaction were fully developed in the district court. Fabric had a fair opportunity to dispute and did present facts pertinent to the issue. The district court addressed and relied on both rescission and accord and satisfaction. Directing summary judgment for Provident on appeal does not result in procedural prejudice to Fabric.

Appendix A

In *Latecoere Int'l., Inc. v. U.S. Department of Navy*, 19 F.3d 1342 (11th Cir. 1994), this court declined to order summary judgment for the appellee who had not asked it of the district court. Its decision was based, however, on the circumstances of the case and the fear that the appellant might be deprived of an opportunity to fairly present its side of the dispute. That consideration is not present here, where the contentions of the parties are clearly drawn and the record is full and adequate. Additionally, *Latecoere* noted that it was unable to find any Eleventh Circuit case in which the power of the court to enter summary judgment for a non-requesting appellant had been exercised. However, it overlooked *Black Warrior Elec. Membership Corp. v. Mississippi Power Co.*, where the power was exercised.

REVERSED and REMANDED with instructions to enter summary judgment for Provident.

APPENDIX B — FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED FEBRUARY 17, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6333-CIV-GONZALEZ
Magistrate — SNOW

ROBERT K. FABRIC, M.D. and ROBERT K. FABRIC, M.D., P.A.,

Plaintiff,

and,

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Defendant.

FINAL SUMMARY JUDGMENT

Plaintiff, ROBERT K. FABRIC, M.D. and ROBERT K. FABRIC, M.D., P.A. a Florida professional association, having moved the court for a summary judgment, and it appearing to the court that there is no genuine issue as to any material fact, (see court's order of November 4, 1994) and that the Plaintiff is entitled to a judgment as a matter of law, it is,

ORDERED AND ADJUDGED that;

1. Summary Judgment is hereby granted in favor of Plaintiff, ROBERT K. FABRIC, M.D. and ROBERT K.

Appendix B

FABRIC, M.D., P.A. a Florida Professional Association, against the Defendant, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation.

2. That Plaintiff, ROBERT K. FABRIC, M.D. and ROBERT K. FABRIC, M.D., P.A. a Florida Professional Association, recover from the Defendant, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, the sum of TWO HUNDRED FORTY THOUSAND DOLLARS ($240,000.00) AND NO/100 CENTS, which shall bear interest from the date of this Final Summary Judgment at the rate of [7.03% per annum] ~~8% per year, for the calendar year of 1995, and the rate of post-judgment interest to be determined by the Comptroller of the State of Florida pursuant to $55.03 F.S., (1994) for each year thereafter this judgment,~~ or any portion of it remains unpaid, together with prejudgment interest of $143,068.32[1] making a total $383,068.32 for which let execution issue. (See § 55.03, F.S., *Biscayne Supermarket. Inc. and K.R.D., Inc. vs Travelers Insurance.* 485 So2d 861, (Fla 3rd DCA, 1986), *Argonaut Insurance Company v May Plumbing Company* 474 So2d 212 (Fla 1985) and *McGurn v Scott* 626 So2d 321 (Fla 1st DCA 1993).

3. The Court specifically reserves jurisdiction to determine the amount of Court costs to be recovered by Plaintiff from Defendant.

---

1. Fabric became totally disabled February 3, 1989 (joint pre-trial stipulation at 11 n 43a and 43b), therefore, the claim date is February 3, 1989, but under the terms of the policy, at page 3, policy provides "Elimination Periods Thirty days of total and or residual disability wherein payments would begin thirty days thereafter. Therefore for the purpose of pre-judgment interest, the claim date is March 3, 1989.

4. Pursuant to Section 627.428(1), Florida Statutes,

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

5. The Plaintiff, having prevailed in this action to enforce their contract rights under Provident Policy Number 6-BOE-827820 is entitled to recover reasonable attorney fees from the Defendant. Therefore, this court specifically retains jurisdiction to determine the amount of attorney fees that the Plaintiff shall recover from the defendant.

DONE AND ORDERED in Chambers at Ft. Lauderdale, County of Broward and State of Florida this 17th day of February, 1995.

s/ Jose A. Gonzales, Jr.
JOSE A. GONZALES, JR.
UNITED STATES DISTRICT JUDGE

Copies to:

Martin G. Brooks, P.A.
Leslie H. Zuckerman, Esq.
Shutts and Bowen

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED FEBRUARY 10, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6333-CIV-GONZALEZ

ROBERT K. FABRIC, M.D., and ROBERT K. FABRIC, M.D., P.A.,

PLAINTIFFS,

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

DEFENDANT.

ORDER

THIS CAUSE has come before the Court upon Defendant's Objection to Entry of Final Judgment and Motion for Reconsideration Based Upon Newly Discovered Evidence and Plaintiff's Motion to Strike Affidavit of John E. Meagher. The Motions have been fully briefed and are ripe for disposition.

This Court granted summary judgment for Plaintiff after concluding, *inter alia*. that there had been no mutual rescission or accord and satisfaction between the parties regarding an insurance policy issued by Defendant to Plaintiff. Defendant moves to reconsider that Order based on what it considers to be newly discovered evidence. To wit, Defendant points to a

Appendix C

September 15, 1989 letter from then Plaintiff's counsel to another insurance company which had issued a policy to Plaintiff. This letter stated, in part:

> As I indicated to you in our meeting, [PROVIDENT] has rescinded their policy effective February 1, 1988. Since the rescission relates back to the effective date, Dr. Fabric was never covered under Provident's disability policy other than the original policy in the amount of $10,000.00. . . .

Defendant attributes great importance to this "admission" by Plaintiff's counsel and argues that "Fabric's lawyer's agreement with Provident's contentions in the instant lawsuit creates, at least, a genuine issue of material fact as to whether Fabric did, in fact, agree to the rescission . . . ." Motion for Reconsideration at 4.

However, whether a contract has been "rescinded" is a legal conclusion. There is nothing to suggest that this letter expresses anything more than a legal opinion, formed by Plaintiff's counsel, on the basis of facts that were already a part of the record of this case when the Court granted summary judgment for Plaintiff. Had the letter pointed to a fact not in the record that could affect this Court's legal conclusion that there was no mutual rescission — for example, "my client wrote Provident a letter saying that reinstating the 1983 policy was fine with him" — then reconsideration might be appropriate. But this is not the case at hand. Whether Plaintiff's counsel believed that the actions taken by FABRIC and PROVIDENT constituted mutual rescission — and it appears in the letter that Plaintiff's counsel is speaking of unilateral rescission, a position which PROVIDENT has expressly refused to adopt in the present case

— is irrelevant. Defendant's Motion for Reconsideration does not bring before the Court, or even suggest, any new facts that would alter this Court's analysis of whether there was a mutual rescission of the subject policy. A statement of counsel's legal conclusion simply is not evidence that the policy was mutually rescinded.

Accordingly, having reviewed the motions and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's Motion to Strike is DENIED. It is further hereby:

ORDERED AND ADJUDGED that Defendant's Motion for Reconsideration is DENIED and Defendant's Objection to Entry of Final Judgment is OVERRULED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 10th day of February, 1995.

s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: All counsel

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 7, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6333-CIV-GONZALES

ROBERT K. FABRIC, M.D., and ROBERT K. FABRIC M.D., P.A.,

PLAINTIFFS,

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

DEFENDANT.

ORDER

THIS CAUSE has come before the Court upon Plaintiff's Motion for Summary Judgment. The motion is fully briefed and the Court has heard oral argument of counsel on the motion.

Summary Judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence and factual inferences are to be viewed in a light most favorable to the non-moving party. *Rollins v. TechSouth, Inc.* 833 F.2d 1525, 1529 (11th Cir. 1987). Accordingly, the Court accepts the facts

as put forth by Defendant, drawing its factual findings herein largely from Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and "Provident's Statement of the Case" in the Joint Pretrial Stipulation.

Upon application by Plaintiff in 1983 Defendant issued business expense policy number 6-BE-571223 (the "1983 policy"). The 1983 policy provided for payment by Defendant to Plaintiff of a maximum of $10,000 per month (for 24 months) of covered business expenses in the event Plaintiff became disabled as defined in the policy. In 1987, Plaintiff sought additional business overhead expense coverage. An application dated December 14, 1987 was submitted to Defendant by an independent insurance agent and Defendant thereafter issued business overhead expense policy number 6-BOE-827820 (the "1988 policy"). The 1988 policy provided for payment by Defendant to Plaintiff of a maximum of $20,000 per month (for 24 months) of covered business expenses in the event Plaintiff became disabled. The 1988 policy explicitly states that it was "issued in lieu of and replaces policy No. 6-BE-571223 dated July 25, 1983".

Question 5(a) of the application for the 1988 policy asks applicant to list additional insurance coverage. Plaintiff listed several disability policies but failed to list an individual disability policy held by Defendant and a group individual disability policy also held by Defendant.

Plaintiff became disabled on or about February, 1989. On March 13, 1989, Leslie Zuckerman, Plaintiff's counsel, wrote to Defendant advising of Plaintiff's disability and enclosing a single Notice of Claim form covering Plaintiff's two individual disability policies and the 1988 policy for business overhead

expenses. The letter stated that "Dr. Fabric would appreciate that all future correspondence regarding this matter be through my [Zuckerman's] office." After requests to Zuckerman for further information regarding Plaintiff's claims, on June 19, 1989, Defendant sent to Plaintiff, care of Zuckerman, a draft for $28,666.67, representing the first payment of business overhead expense benefits under the 1988 policy.

By that time, during its review of Plaintiff's claim, Defendant had learned of Plaintiff's other disability insurance coverage that had not been disclosed on the application for the 1988 policy. Defendant then undertook to investigate whether it would have issued the 1988 policy to Plaintiff if it had known of Defendant's omitted individual and group individual disability insurance coverage. These concerns were communicated to Plaintiff's counsel, Zuckerman, on July 12, 1989. Zuckerman was further advised that until these concerns were resolved, Defendant would pay Plaintiff the $10,000 per month benefits that Plaintiff would be entitled to under the 1983 policy if it had not been replaced by the 1988 policy.

After this review, Defendant determined that Plaintiff would not have issued the 1988 business overhead expense policy if Defendant had known at the time of application that Plaintiff held the non-disclosed policies. Thereupon, Defendant sent a letter (the "reissuance letter") to Plaintiff's counsel stating:

> Our underwriting Department has reviewed the information concerning Dr. Fabric's disability coverage with us and other carriers. The amount of disability insurance in force exceeds the limits of coverage we would have been willing to issue.

Appendix D

> The 12/14/87 application for overhead coverage did not contain the complete outline of disability insurance coverage in force at that time. Had our underwriting Department been aware of the extent of disability coverage in force the 12/14/87 application would not have been approved and no additional overhead expense coverage would have been issued. Again the reason being that Dr. Fabric's 12/14/87 application exceeded our Underwriting approval limits. This rule applies to both overhead and disability income coverage as well.
>
> Our only choice was to reissue Policy #06 BE 571223 [the 1983 policy] which we have enclosed. Again please accept our sincere apology for the extreme delay in getting this to you. Should you have any questions concerning this please do not hesitate to contact us.

Over the next Sixteen months, Defendant sent Plaintiff monthly $10,000 drafts carrying the policy number of the 1983 policy, all of which were cashed by Plaintiff.

In January of 1983 Defendant sent Plaintiff a draft for $939.00, explaining to Plaintiff that that amount represented the difference between the 1983 policy premiums and the 1988 policy premiums. This check was never cashed by Plaintiff. The last draft sent to Plaintiff was for $11,3333.33 and was marked "In full settlement of claim originating on or about February 3, 1989." The draft also stated that "this is a full & final payment as you have received the maximum allowance under this contract." The draft was accompanied by a letter which stated that the "final check" on the 1983 policy was enclosed.

Appendix D

Although there are facts that are disputed by the parties, or which have otherwise yet to be developed, they are not material given Florida law. Because the Court finds that each of Defendant's affirmative defenses are unavailing under Florida law, based on the facts that are not in dispute, summary judgment for Plaintiff is appropriate in this cause.

The primary focus of argument between the parties is whether Defendant's action constituted an effective rescission of the 1988 policy. Defendant's "consistent position throughout this case [has been] that the policy was rescinded by agreement, through an accord and satisfaction." Defendant's Memorandum in Opposition at 13 n.8. *Pino v. Union Bankers Ins. Co.*, 627 So.2d 535 (Fla.App. 3 Dist. 1993), in a context similar to the one here, discussed the two ways that rescission can be accomplished:

> (1) Mutual agreement of rescission. Under this alternative the parties enter into an agreement to rescind their existing contract. There must be an offer, acceptance, and consideration for there to be a mutual agreement of rescission. "If all such rights have been discharged there has been both 'rescission' and accord and satisfaction.' "
>
> (2) Rescission by one party as a matter of right for fraud or misrepresentation. Where a party is induced to enter into a contract by fraudulent misrepresentations, the defrauded party may elect to rescind, or avoid, the contract.

Pino at 536 (citations omitted throughout). Again, Defendant argues that a mutual agreement of rescission occurred, and

expressly declines to argue that its reissuance letter was an attempt at unilateral rescission of the 1988 policy. (Indeed, the court concludes that the reissuance letter, which did not include a refund of the 1988 policy premium, and the Defendant's subsequent actions do not constitute a clear manifestation of an election to unilaterally rescind the contract because of omissions in the application. Rather, Defendant seems to pursue some half-way path of trying to go back to the way things would have been, from Defendant's perspective, but for the omissions in the application.)

While Defendant's course of action did not constitute an effective unilateral rescission, it also fell short of being on offer of accord and satisfaction (or mutual agreement of rescission). "The letter does not propose that the insured and the insurance company enter into a mutual agreement of rescission; instead the letter simply announces, as an accomplished fact, that the insurance company [has taken a certain course of action]". *Pino* at 537. Taking the facts as alleged by Defendant, the Court concludes that there is simply no offer, acceptance, and consideration regarding the reestablishment of the 1983 policy. Therefore, there is no rescission of the 1988 policy or accord and satisfaction under Florida law. Rather, there has been a breech of that contract by Defendant.

Defendant's reissuance letter states that: "Our only choice was to reissue #06 BE 571223 [the 1983 policy]." To the contrary, the effective legal choices under Florida law would have been to either unilaterally rescind the policy or to seek an accord and satisfaction. Unfortunately for the Defendant, the seemingly ad hoc remedy of unilaterally "reissuing" an old policy does not allow Defendant to escape the 1988 policy entered into between Defendant and Plaintiff.

Further, the Court concludes that Plaintiff is not estopped from bringing this action and that Plaintiff has not waived any rights or benefits under the 1988 policy, nor is Plaintiff's action otherwise barred.

Accordingly, having reviewed the motion and the record, and having heard oral argument of counsel, and *being* otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED. Plaintiff is directed to file a final form of judgment for entry in this cause within twenty (20) days of the date of this Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 4th day of November, 1994.

s/ Jose A. Gonzalez. Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: All counsel

APPENDIX E — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 21, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 95-4388; 95-4975

ROBERT K. FABRIC, M.D.; ROBERT K. FABRIC, M.D., P.A., a Florida Professional Association,

Plaintiffs-Appellees,

versus

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, a Tennessee Corporation authorized to do business in the State of Florida,

Defendant-Appellant

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d____).

Before: TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

Appendix E

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; eleventh Circuit Rule 35-5), the Suggestion(s) or Rehearing en Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE